IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

LYNN FOX-EMBREY,
Petitioner/Real Party in Interest,

v.

HON. DELIA NEAL, JUDGE OF THE SUPERIOR COURT
OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PINAL,
Respondent,

and

SHAWN MAIN,
Real Party in Interest/Cross-Petitioner.

No. 2 CA-SA 2019-0045
Filed June 4, 2020

Special Action Proceeding
Pinal County Cause No. S1100CR201503954

JURISDICTION ACCEPTED;
RELIEF GRANTED IN PART, DENIED IN PART

COUNSEL

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OPINION

Presiding Judge Eppich authored the opinion of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

E P P I C H, Presiding Judge:

¶1 In this special-action proceeding arising from a criminal case involving a charge of capital murder and multiple counts of child abuse, we are asked to address issues regarding the scope of disclosure a defendant is entitled to when records sought are privileged and confidential, and the victims have invoked their rights and protections under the Victims' Bill of Rights. We are required to determine whether the respondent judge erred in applying the standard set forth in *State ex rel. Romley v. Superior Court* (*Roper*), 172 Ariz. 232 (App. 1992), and its progeny, including *State v. Kellywood*, 246 Ariz. 45 (App. 2018), placing limitations on certain documents she ordered disclosed for an in camera review, and denying the request for an in camera review of other protected records. We accept jurisdiction of the special-action petition filed by Lynn Fox-Embrey, the guardian of the minor victims, and the cross-petition filed by defendant Shawn Main. For the reasons stated, we deny Fox-Embrey relief but grant Main the relief she has requested.

Factual and Procedural Background

¶2 The facts and procedural history are based on the record the parties have provided and their briefing below and in this court. According to Main, in December 2014, D.C., A.C. and T.C., then ages five, four and three, respectively, and their pregnant mother moved into the home Main shared with her wife near Casa Grande. The children and their mother had been living in a hotel room with their paternal grandmother. The children

were thin and ill when they arrived, and T.C. had received emergency medical treatment the previous day.

¶3 Also according to Main, on the morning of November 19, 2015, she awoke to the sound of T.C. vomiting and choking. Main picked up the child and noticed she was warm and was not breathing well. Main splashed water on T.C.'s face and cleared her airway but she did not respond. Main's wife began administering CPR. Main called 9-1-1 and began driving T.C. to a nearby hospital. Paramedics met Main along the way and took T.C. to the hospital, where she was pronounced dead. Main, her wife, and the children's mother were questioned at the Pinal County Sheriff's Office (PCSO). The following day, the medical examiner determined the cause of T.C.'s death was unexplained blunt force injuries to the head.

¶4 T.C.'s siblings, D.C. and A.C., were transported to a location in Pinal County for forensic interviews and examinations by a sexual assault nurse examiner.[1] According to Fox-Embrey, law enforcement reports reflect that the children appeared to be the victims of physical abuse and neglect. D.C. apparently had a broken nose and a facial injury, and both children appeared to be undernourished. Law enforcement officers alerted the Department of Child Safety (DCS). The children were removed from the home on November 19, 2015, and taken into protective custody. They were eventually placed with Fox-Embrey. On December 24, 2015, a couple of weeks after follow-up interviews, Main, her wife and the children's mother were arrested. Main was charged by indictment with first-degree murder of T.C., three counts of child abuse of T.C., child abuse of D.C. based on the broken nose and other head and facial injuries, and two counts of child abuse based on her having caused or permitted D.C. and A.C. to become malnourished. The state is seeking the death penalty on the murder charge.

¶5 According to Main, the state provided her with initial disclosure that included more than six hundred pages of the children's confidential medical records and DCS records, none dated after D.C. and A.C. were removed from the home on November 19, 2015. Main filed a

[1] Main referred to this as a S.A.N.E. examination, which is an examination by a Sexual Assault Nurse Examiner conducted in accordance with the Pinal County Attorney's Office (PCAO) protocols for the joint investigation of child abuse and neglect by the PCAO, Office of Child Welfare Investigations (OCWI), and Department of Child Safety (DCS).

number of motions seeking production of DCS records from and after that date, including medical and therapeutic records. In August 2016, Main filed her Third Motion for Court Order for Release of Confidential Records, seeking records from DCS or any agency or agent with which DCS had contracted from and after November 19, 2015, including records of the following: mental health, therapy, counseling, psychiatric, or psychological services provided; medical services; school records, including counseling and disciplinary records if they exist; and, audio, video and transcripts of statements or interviews of the children. Main argued the records might contain exculpatory or impeachment evidence, are relevant, probative, essential to justice, material to guilt or innocence or punishment, and "not unduly prejudicial or inflammatory," adding such disclosure is "clearly more important to the 'interests of substantial justice' than any protection that may extend as a result of the [privileged] relationship."

¶6 Pinal County Superior Court Judge White held a hearing in October 2016 on various outstanding motions. The state, Main and her counsel, counsel for DCS, and counsel who had been appointed by the juvenile court to represent D.C. and A.C. in the dependency proceeding and who Judge White appointed to represent the children as victims in the criminal proceeding, attended the hearing. Judge White ordered DCS to disclose to Main records in its possession related to Main and the children "with the exception of any records that are protected by confidentiality rules under State or Federal law," requiring any protected documents be provided to him "for an in-camera review to determine if any of the records are relevant." The judge noted the state claimed it already had disclosed many documents, and although it opposed disclosing counseling records directly to Main, it was willing to disclose them to the court for an in camera review. Counsel for the children asked the court to seal and conduct an in camera review of the confidential therapy and counseling records, and requested that, if the records were to be used for trial, they remain under seal and not disclosed to the public.[2] Judge White directed Main to lodge a

[2] At oral argument before this court, we asked counsel for Fox-Embrey whether any objection to an in camera review of the protected records had been waived. Counsel explained that she was not the attorney who had represented the children at that hearing. Additionally, as she correctly points out, Judge White subsequently permitted her to object to the in camera review, and she maintained that objection in the first special action before this court and again when the case was remanded to the trial court and the respondent judge was assigned to the case. Under these circumstances, even assuming the objection was initially waived, Fox-

formal order, which she did, but the order was never signed. In May 2018, Main filed a motion for an order directing the Casa Grande office of the Special Nutrition Program for Women Infants and Children, or WIC, to release records regarding all three children from January 2014 through December 31, 2015. WIC is a federal program that provides women and children nutritional assistance and education, and obtains a child's health information, including height and weight, when monthly benefits are renewed. It is operated through the Department of Health Services (DHS).

¶7 In July 2018, Fox-Embrey, by that time appointed as D.C. and A.C.'s guardian, filed a request for clarification through her counsel. Judge White granted her leave to file an objection to his prior order requiring disclosure, which she did, asking him to reconsider the in camera review of the victims' protected records on the ground that the disclosure would violate their rights under the Victims' Bill of Rights (VBR), Ariz. Const. art. II, § 2.1. The judge granted Main's request for an in camera review of the WIC records over Fox-Embrey's objection. He denied her subsequent motion for reconsideration, ordering that all documents, including the DCS records, be disclosed for in camera review.

¶8 Fox-Embrey filed a special action in this court. We accepted jurisdiction and granted relief, in part, directing the respondent judge to consider the issues raised in light of this court's decision in *Kellywood*. *Fox-Embrey v. White* (*Main*), No. 2 CA-SA 2018-0084 (Ariz. App. Jan. 24, 2019) (order).

¶9 When the case was returned to Pinal County Superior Court, it was reassigned to the respondent judge, who conducted a review hearing in late January 2019. She directed the parties to submit memoranda identifying what records the state had disclosed to Main, and what records she continued to seek. Main filed three motions. The first was a Renewed Motion for Court Order for Release of T.C.'s Medical Records. The second was a Renewed Motion for Court Order for Release of Medical Records (D.C. and A.C.). Main asserted she was entitled to medical records to respond to the allegations that the children were malnourished and that D.C. had been physically injured, to explore possible genetic causes of malnourishment and the other alleged manifestations of abuse, and to find evidence regarding the children's truthfulness, reliability and credibility, including any evaluation of D.C. to determine whether he qualified for an

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Embrey was permitted to withdraw the state's concession. We will not therefore find Fox-Embrey's objection to the in camera review waived.

autism spectrum disorder diagnosis. Main argued she needed all of these records dating from the children's births to determine whether they had a genetic disorder that may have caused the pediatric trauma, injury and T.C.'s intracerebral hemorrhage. By seeking all medical records dating from the children's births, Main broadened the WIC records request. The third motion was Main's Renewed Motion for Court Order for Release of DCS Records, specifically therapeutic and other records from and after November 19, 2015. Fox-Embrey filed a memorandum objecting to the requested disclosure, including a review of the records in camera.

¶10 Based on discussions with counsel for the parties at the beginning of the hearing on the motions in February 2019, the respondent judge stated the parties were permitted to go beyond the scope of the *Kellywood* inquiry this court had placed before her in the first special action. Fox-Embrey specified at that hearing that she did not object to disclosure of T.C.'s medical records; she was only objecting to disclosure of D.C. and A.C.'s medical and counseling records, and the WIC records, which the parties stipulated would be regarded as medical records.[3] *See* A.R.S. § 12-2291 (defining medical records). Main asked for all WIC records in the possession of DHS's Casa Grande office. The state essentially took no position but, at most, impliedly aligned itself with Fox-Embrey on behalf of the victims.

¶11 In her June 14, 2019 ruling, the respondent judge acknowledged the disputed records pertaining to D.C. and A.C. are privileged and confidential. She distinguished the Supreme Court's decision in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), which Main had relied on extensively, noting that case did not address the competing constitutional rights of victims and criminal defendants. Reviewing the disclosure request under *Roper*, and recognizing the tension between a crime victim's rights under the VBR to refuse the request and a defendant's due process rights, she then applied *Kellywood*.

¶12 The respondent judge rejected Main's argument that she needed the children's medical and other records to address the issues of malnourishment, physical injury and the children's truthfulness, reliability and credibility. The respondent found Main had "not articulated a reasonable basis for the production of these records and, indeed, has based her request on mere conjecture without specificity, that a genetic disorder

[3] Although Fox-Embrey objected to disclosure of school records, Main had withdrawn her prior request for those records.

might explain 'pediatric trauma.'" With respect to D.C. and A.C.'s medical records, the respondent found Main had not provided "a scintilla of evidence" to show a diagnosis that D.C. is on the autism spectrum would affect his "ability to tell the truth." But, she found, in light of the injuries to D.C.'s face, Main was entitled to medical records relating to the period around the dates listed in the indictment, should they exist.

¶13 The respondent judge further found that records from doctors' visits may also include evidence regarding malnourishment, and it was not "unreasonable" for Main to be able to view the WIC and other medical records for the year before D.C. and A.C. were removed from the home. She therefore ordered that WIC records for the period from November 19, 2014, through November 19, 2015, be produced for an in camera review. Citing *State v. Sarullo,* 219 Ariz. 431 (App. 2008), and *State v. Connor*, 215 Ariz. 553 (App. 2007), she found Main had demonstrated there was a reasonable possibility the information she was seeking was information to which she was entitled as a matter of due process. The respondent denied the request for school records as well as therapy, psychological, or psychiatric records for D.C. and A.C. that Main presumes exist in the DCS file.

¶14 Fox-Embrey filed a special-action petition, challenging the order compelling disclosure of any WIC and previously undisclosed physician records. Main filed a cross-petition arguing the respondent judge had erred in limiting the production of WIC documents to the twelve-month period and denying her request for additional medical, psychological and therapeutic records that she believes are in the DCS file.

Special-Action Jurisdiction

¶15 Crime victims have standing to bring a special action in order to enforce rights guaranteed to them under the VBR. *See* A.R.S. §§ 13-4403 (victim representatives), 13-4437(A) (standing under VBR); *see also P.M. v. Gould*, 212 Ariz. 541, ¶¶ 13-15 (App. 2006) (victim has standing to bring special action to oppose disclosure of privileged records). In addition, the issues in these special actions relate to disclosure of documents that are confidential and protected either by statute, the VBR or both, issues that are particularly appropriate for special-action review. *See* § 13-4437(A); *Gould*, 212 Ariz. 541, ¶¶ 13-15; *see also State v. Brown*, 210 Ariz. 534, ¶ 5 (App. 2005) (citing Ariz. R. P. Spec. Act. 1(a)) (acceptance of special-action jurisdiction appropriate when remedy by appeal not equally plain, speedy or adequate). And, although discovery decisions are generally discretionary, *State v. Fields*, 196 Ariz. 580, ¶ 4 (App. 1999), the interpretation and

application of statutes and constitutional provisions in determining whether a privilege applies are questions of law subject to review de novo, which are particularly appropriate for special-action review, *State v. Zeitner*, 246 Ariz. 161, ¶ 8 (2019); *see also Connor*, 215 Ariz. 553, ¶ 6 (claim that nondisclosure of records affects defendant's constitutional right to present defense is question of law appellate court reviews de novo).

¶16 Furthermore, the fact that the state is seeking the death penalty for the murder charge places before this court for the first time the implications of capital jurisprudence in this context. And when a case presents an issue of first impression and statewide importance, acceptance of special-action jurisdiction may be appropriate. *Gilbert Prosecutor's Office v. Foster*, 245 Ariz. 15, ¶ 5 (App. 2018). For all the reasons stated above, we accept jurisdiction of the petition and cross-petition for special-action relief.

Discussion

Ritchie, *Roper* and Its Progeny, and *Lockett*

¶17 It is well settled that a criminal defendant generally has no greater rights to discovery under the United States Constitution than that which exists under state law. *See Ritchie*, 480 U.S. at 59-60. Nor does *Brady v. Maryland*, 373 U.S. 83 (1963), create such a right. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). But, a defendant does have a due process right to a fundamentally fair trial, which includes the right to present a complete defense and the right to effectively cross-examine material witnesses. *California v. Trombetta*, 467 U.S. 479, 485 & n.6 (1984); *State v. Dunbar*, No. 2 CA-CR 2018-0064, 2020 WL 2060275, ¶ 25 (Ariz. Ct. App. Apr. 29, 2020); *see also Davis v. Alaska*, 415 U.S. 308, 320 (1974) (right to effective cross-examination); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (right to present defense); *Connor*, 215 Ariz. 553, ¶ 12 ("Due process requires that the defendant receive 'a meaningful opportunity to present a complete defense.'" (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006))). To that end, *Brady* requires the state "to disclose exculpatory evidence that is material on the issue of guilt or punishment." *State v. Tucker*, 157 Ariz. 433, 438 (1988). Arizona's discovery rules are "intended to effectuate the constitutional right of cross-examination." *Murphy v. Superior Court*, 142 Ariz. 273, 278 (1984). Thus, in addition to the state's disclosure obligations, "a court may order any person to make available to the defendant material or information [the defendant requests] . . . if the court finds [that] the defendant has a substantial need for the material or information to prepare the defendant's case" and "cannot obtain the substantial equivalent by other means without undue hardship." Ariz. R. Crim. P. 15.1(g)(1).

¶18 Juxtaposed against and often in tension with defendants' constitutional and rule-based rights are the rights of victims under the VBR. That law gives victims the right to be treated fairly and with dignity, to be "free from intimidation, harassment or abuse," and "[t]o refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant." Ariz. Const. art. II, § 2.1(A)(1), (5); *see also* Ariz. R. Crim. P. 39(b)(12) (victim may refuse discovery request). The right to refuse discovery generally includes the right to refuse to disclose medical records, *Sarullo*, 219 Ariz. 431, ¶ 20, which are also protected by statutory privileges, *see* A.R.S. §§ 13-4062(4) (prohibiting examination of "[a] physician or surgeon, without consent of the physician's or surgeon's patient, as to any information acquired in attending the patient which was necessary to enable the physician or surgeon to prescribe or act for the patient"), 32-2085(A) (establishing psychologist-patient privilege). A victim's right to refuse discovery under the VBR, however, is not absolute. *Kellywood*, 246 Ariz. 45, ¶ 8 (citing *Sarullo*, 219 Ariz. 431, ¶ 20). It must yield to a defendant's due process right to present a complete defense. *See id.* (when defendant's due process right conflicts with VBR, "due process is the superior right" (quoting *Roper*, 172 Ariz. at 236)). And "[p]rivilege statutes, which impede the truth-finding function of the courts, are restrictively interpreted." *Church of Jesus Christ of Latter-Day Saints v. Superior Court*, 159 Ariz. 24, 29 (App. 1988).

¶19 In *Ritchie*, the Supreme Court considered "whether and to what extent a State's interest in the confidentiality of its investigative files concerning child abuse must yield to a criminal defendant's Sixth and Fourteenth Amendment right to discover favorable evidence." 480 U.S. at 42-43. Charged with sexual offenses involving his thirteen-year-old daughter, the defendant in *Ritchie* sought not only the investigative file of Pennsylvania's Children and Youth Services (CYS) agency regarding the incidents underlying the criminal charges, but records, including medical records, relating to prior, unrelated reports that the defendant had been abusing his children. *Id.* at 43-44. The Court concluded in its plurality decision that the Confrontation Clause does not provide a defendant with a constitutionally compelled right to pretrial discovery. *Id.* at 52. Narrowing the scope of its decision in *Davis*, it made clear that *Davis* does not stand for the proposition that "a statutory privilege cannot be maintained when a defendant asserts a need, prior to trial, for the protected information that might be used at trial to impeach or otherwise undermine a witness' testimony." *Id.* at 52. Acknowledging but not deciding the case based on the Sixth Amendment's Compulsory Process Clause, the Court determined a criminal defendant does have a right to obtain certain

evidence based on the Fourteenth Amendment's Due Process Clause. *Id.* at 55-58.

¶20 The Court acknowledged the state's obligation under *Brady* to disclose evidence in its possession that is favorable to the defense and material to guilt or punishment. *Id*. at 57. Significantly, however, the Court impliedly found the requested records were not in the state's possession when it observed that the materiality of the information could not be determined because neither the prosecutor nor defense counsel had seen the privileged records, nor had the trial court. *Id*. at 59. The Court concluded a fair trial could only "be protected fully by requiring that the CYS files be submitted . . . to the trial court for *in camera* review." *Id*. at 60. It recognized the strong public interest in protecting sensitive information, but nevertheless found that this did not prevent disclosure if, after reviewing it, a court "determines that the information is 'material' to the defense of the accused." *Id*. at 57-58. Notably, there was no competing federal or state constitutional right belonging to the victim that came into play in *Ritchie*, only a state statutory privilege.

¶21 In *Roper*, a special action brought by the state, this court considered principles addressed in *Ritchie* in determining whether the trial judge had erred in granting the defendant's request for the psychiatric records of her husband, the victim of the aggravated assault charge, over his objections under the VBR and the privilege statute, § 13-4062(4). *Id*. at 240. We acknowledged the tension between the rights of criminal defendants and the rights of victims under the VBR and based on statutory privileges. 172 Ariz. at 236. We observed that, concomitant with the federal and state constitutional right to present a defense, a defendant has the "right to effective cross-examination of a witness at trial." *Id*. Relying in part on *Ritchie*, we held that "by virtue of the Supremacy Clause," when a "defendant's constitutional right to due process conflicts with the [VBR] in a direct manner . . . due process is the superior right." *Id*. at 236.

¶22 We also observed in *Roper* that although state courts may limit discovery in criminal cases, any limitation is subject to the requirements of *Brady*, "which established that the due process clauses of the Fifth and Fourteenth Amendments give a defendant the right of access to any evidence favorable to the defense and material to either guilt or punishment," whether the evidence is exculpatory or serves as impeachment evidence. *Id*. at 238-39. We added that the VBR "does not give victims a right to prevent the prosecution from complying with requests for information within the prosecutor's possession and control." *Id*. (emphasis omitted). Balancing these competing rights and interests, we

directed the trial court to review the records to determine whether they contained information that was "exculpatory and . . . essential to presentation of the defendant's theory of the case, or necessary for impeachment of the victim relevant to the defense theory." *Id*. at 239 (emphasis omitted).

¶23 A number of Arizona decisions involving disclosure of a victim's privileged or confidential records followed *Roper*, including *Connor*, *Sarullo* and *Kellywood*. A test derived from *Roper* was applied in all three cases: when a defendant's due process right to a meaningful opportunity to present a defense directly conflicts with the victim's rights under the VBR, the victim "may be compelled to produce treatment records for *in camera* inspection if the defendant shows a 'reasonable possibility that the information sought . . . include[s] information'" the defendant is entitled to "'as a matter of due process.'" *Kellywood*, 246 Ariz. 45, ¶ 8 (quoting *Sarullo*, 219 Ariz. 431, ¶ 20) (alteration in *Sarullo*); *see also Connor*, 215 Ariz. 553, ¶ 10 (same).

¶24 In *Connor*, the defendant argued on appeal from a first-degree murder conviction the trial court had erred in denying his request for pretrial review of the victim's medical, counseling, psychological, and psychiatric records to support his defense that he had acted in self-defense. 215 Ariz. 553, ¶¶ 1, 4. We distinguished *Roper* on the ground that the victim in that case previously had attacked the defendant, had been arrested and convicted of domestic violence, and had received years of extensive psychiatric treatment. *Id*. ¶ 8. The defendant had shown there was "a reasonable possibility" the information she was seeking was information she was entitled to as a matter of due process, justifying the in camera review of the records. *Id*. In *Connor*, however, we concluded the defendant had not presented a "sufficiently specific basis to require" disclosure of the victim's medical records for an in camera review. *Id*. ¶ 11.

¶25 Similarly, in *Sarullo*, an appeal from burglary and aggravated assault convictions, we found the defendant had not satisfied his burden of establishing he was entitled to an in camera review of the victim's medical and counseling records as a matter of due process. 219 Ariz. 431, ¶¶ 1, 19–21. The defendant had claimed he needed the records to show that the victim, with whom he previously had been romantically involved, had not believed at the time of the offense that the defendant was threatening her; rather, she had known he was threatening to commit suicide. *Id.* ¶¶ 2, 19. The defendant claimed the victim subsequently developed a psychological need to view the incident as an assault. *Id.* ¶¶ 19–21. We concluded the defendant had not "presented a sufficiently specific basis for requiring"

disclosure of the victim's records, having provided no reason to believe the records would contain exculpatory evidence. *Id.* ¶ 21.

¶26 A majority of this court reached the same conclusion in *Kellywood*. Appealing convictions of multiple sexual offenses committed over a period of years involving his adopted daughter, the defendant argued the trial court had erred in denying his motion to compel disclosure of the victim's medical, DCS, and counseling records for an in camera review, claiming they possibly contained exculpatory evidence. 246 Ariz. 45, ¶¶ 1–3. The defendant argued he had presented sufficient information that the records might contain impeachment evidence that would support his claim that she had fabricated the allegations because she had been angry at him, and suggested the records might show she had been asked if anyone had engaged in sexually inappropriate conduct with her and she had denied it. *Id*. ¶ 5.

¶27 Affirming the convictions, we concluded that "the mere possibility [that the victim] could have said something exculpatory is not, as a matter of law, sufficient by itself to require her to produce the medical and counseling records sought by" the defendant. *Id*. ¶ 6. Applying the test from *Roper*, *Connor* and *Sarullo*, we stated the defendant was required to establish a reasonable possibility the information sought included information to which he was entitled as a matter of due process. *Id*. ¶ 8. We added that, "[i]n light of the competing constitutional interests, as well as the ordinarily privileged nature of patient-provider communications," that burden "is not insubstantial, and necessarily requires more than conclusory assertions or speculation on the part of the requesting party." *Id*. ¶ 9. Because the defendant had not identified any specific condition for which the victim had been receiving treatment or counseling, had provided no support for the assumption that physicians and counselors necessarily would have asked the victim about sexual abuse, and had not specified the medical treatment provided or counselor who had seen the victim, there was an insufficient basis for an in camera review of the protected records.[4] *Id*. ¶ 10.

[4]While this special action was pending, a different department of this court decided *R.S. v. Thompson*, 247 Ariz. 575 (App. 2019). Fox-Embrey filed a notice of supplemental authority, and we permitted both parties to provide supplemental briefing on any implications of this decision to this case. In her memorandum and at oral argument before this court, Fox-Embrey characterized *Thompson* as demonstrating this court's "continued . . . pushback against" *Roper*, and urged us to adopt a more

¶28 Main asserts that when the state is seeking the death penalty, capital jurisprudence necessarily affects the application of the *Roper/Kellywood* "reasonable possibility" test, an issue the courts of this state have never addressed. Relying in particular on the Supreme Court's decision in *Lockett v. Ohio*, 438 U.S. 586 (1978), she argues that in balancing the rights of victims under the VBR or a statutory privilege against the rights of a capital defendant, the defendant's constitutional rights are more compelling and necessarily must be given greater weight in favor of disclosure of a victim's privileged or confidential records. And, she argues, not only is she entitled to the records under *Brady*, in light of the fact that the state is seeking the death penalty here, she "per se" has established both a substantial need for the documents under Rule 15.1(g)(1) as well as a reasonable possibility that she is entitled to the records as a matter of due process under *Kellywood*.

¶29 The Supreme Court stated in *Lockett* that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." 438 U.S. at 604 (alteration in *Lockett*) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). A sentencing jury may not be precluded from considering any relevant evidence in mitigation. *See id*. at 604-05; *Gardner v. Florida*, 430 U.S. 349, 353, 362 (1977) (plurality opinion finding

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stringent standard for determining whether documents protected by the physician-patient privilege must be disclosed. The court held in *Thompson* that as to privileged records to which *Brady* does not apply, "the 'reasonable possibility' standard for in camera review is inadequate," and a defendant must instead establish "a substantial probability that the protected records contain information that is trustworthy and critical to an element of the charge or defense," or that the "unavailability [of such records] would result in a fundamentally unfair trial." *Id.* ¶ 24. The court stated it was departing from *Roper* to the extent *Roper* implies a defendant has "a general constitutional right to discovery from a third party." *Id.* ¶ 22. Neither *Roper* nor its progeny suggests this. Therefore, to the extent *Thompson* departs from rather than merely distinguishes *Roper*, we decline Fox-Embrey's invitation to follow it and instead confirm the continued propriety and vitality of the *Roper* test, as applied by this court in *Connor*, *Sarullo* and *Kellywood*. We note, too, that Main argued before this court that even if we were to agree with and adopt the standard set forth in *Thompson*, she has met that burden as to all documents requested.

defendant denied due process when death sentence imposed based on presentence report with confidential portions not disclosed to counsel). The threshold for determining what is relevant and material evidence for mitigation purposes is low; any evidence that tends to prove or disprove some fact or circumstance that a trier of fact could reasonably deem to have some mitigating value is evidence that should be admitted. *See Tennard v. Dretke*, 542 U.S. 274, 284-86 (2004). The defendant must be able to present any relevant evidence that "might serve" as a basis for a sentence other than death. *See Skipper v. South Carolina*, 476 U.S. 1, 5 (1986).

¶30 Section 13-751(G), A.R.S., includes language from *Lockett*. A jury may not be prevented from considering relevant mitigation evidence. *See* § 13-751(C) (providing prosecution or defendant may present "any information that is relevant to" mitigating circumstances in subsection G). Mitigating factors are "any factors proffered by the defendant or the state that are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense." § 13-751(G); *see also State v. Johnson*, 247 Ariz. 166, ¶ 67 (2019). Among the factors listed in the statute are diminished capacity, "unusual and substantial duress," the fact that the defendant was accountable as an accomplice but her participation was relatively minor, and the fact that the defendant could not reasonably have foreseen the conduct would cause or create a grave risk of death. § 13-751(G). The defendant has the burden of proving the existence of mitigating circumstances by a preponderance of the evidence. § 13-751(C). Jurors need not unanimously agree a mitigating circumstance has been established; each juror may consider any such factor that juror finds in determining the appropriate penalty. *Id*. The state, however, has the burden of proving the aggravating circumstances in § 13-751(F) beyond a reasonable doubt. § 13-751(B).

¶31 We find the Connecticut Supreme Court's decision in *State v. Santiago*, 49 A.3d 566, 647-48, 651 (Conn. 2012), *superseded on other grounds*, 122 A.3d 1 (Conn. 2015), on the issue of disclosure of protected records in this context instructive. There, the court acknowledged the "due process origins of the in camera review procedure" for privileged records under *Ritchie*, noting the "breadth of the scope of the mitigation inquiry in the death penalty context" under *Lockett*. The court concluded:

> [U]nder the fourteenth amendment due process clause, when a defendant in a death penalty prosecution seeks privileged material for purposes of establishing his case in mitigation,

> the defendant first must establish a reasonable ground to believe that the privileged material contains information material to his case in mitigation. If the defendant makes this threshold showing, then the trial court is required to conduct an in camera review of the privileged material, produced under seal, to determine whether it, in fact, contains such information. After the in camera review, the trial court must turn over to the defendant or his counsel any records that are material to his case in mitigation. If, in the opinion of the trial court, the in camera review does not disclose relevant material, then that court must reseal the record or the undisclosed portions thereof for inspection on appellate review.

Id. at 651; *see also People v. Bean*, 560 N.E.2d 258, 262, 270-72 (Ill. 1990) (approving *Ritchie* in camera review of privileged documents in appeal from murder conviction and death sentence challenging pretrial disclosure order requiring production of only a portion of key witness's mental health records).

¶32 Applying a "plenary" as opposed to abuse-of-discretion review of the trial court's in camera examination of records to determine materiality of mitigation information in privileged records, as defined in *Brady*, the court in *Santiago* vacated the sentence and remanded the case for resentencing. 49 A.3d at 651, 693. The court concluded, "the trial court improperly failed to disclose certain documents . . . that potentially would have given the jury a broader and more comprehensive picture of the defendant's family history to consider as a mitigating factor." *Id*. at 639.

¶33 We agree with Main, therefore, that state and federal capital jurisprudence, as well as the related Arizona statute, necessarily affect the balancing of a capital defendant's rights against those of a victim under the VBR and a statutory privilege. The parameters of what information a defendant would be entitled to as a matter of due process under *Kellywood* necessarily are more expansive in a capital case. Under *Kellywood* and the cases that preceded it, a defendant is entitled to an in camera review of protected records as a matter of due process if there is a reasonable possibility they contain exculpatory information or impeachment evidence. 246 Ariz. 45, ¶ 8; *see also Sarullo*, 219 Ariz. 431, ¶ 21 (affirming denial of disclosure because defendant gave court no reason to believe victim's

medical records would contain exculpatory evidence); *Roper*, 172 Ariz. at 239 (requiring disclosure of victim's medical records if "necessary for impeachment of the victim relevant to the defense theory"). A capital defendant is similarly entitled to an in camera review of protected records for exculpatory information or impeachment evidence. But, the capital defendant is also entitled to an in camera review of such records if the defendant establishes there is a reasonable possibility the records contain evidence relevant and material to sentencing, specifically information that may establish mitigating circumstances or evidence that may create a reasonable doubt as to any aggravating circumstance the state attempts to prove.

¶34 Fox-Embrey argues that Main's reliance on *Lockett* and capital jurisprudence in connection with the counts involving D.C. and A.C. is misplaced because Main cannot be sentenced to death on those charges. We are unconvinced by that argument, however. As discussed below, *see* ¶ 46 *infra*, the charges are being tried together and we are persuaded by Main that there is likely to be a spill-over effect between the capital charge and the remaining offenses. Moreover, also as discussed below, evidence regarding Main's treatment of D.C. and A.C. may be material to the issue of her guilt on the murder charge and may serve as evidence of aggravation or mitigation. It does not appear from her ruling that the respondent judge considered the implications of death penalty jurisprudence when she balanced the interests and rights of D.C. and A.C. against Main's constitutional rights. We therefore review the respondent's ruling de novo, taking into account the fact that the state is seeking a sentence of death for the alleged murder of T.C.

WIC Records

¶35 The respondent judge found disclosure of WIC records for an in camera review was appropriate because the child abuse charges are based on the allegation that Main caused D.C. and A.C. to be malnourished. Relying on *Sarullo* and *Connor*, she concluded that Main had established a reasonable possibility the records would include information she was entitled to as a matter of due process. But, the respondent only ordered production of WIC records for the year preceding the children's removal from the home in November 2015, and stated she would limit her review to information regarding malnourishment.

¶36 Fox-Embrey contends the respondent judge erred in ordering disclosure of any WIC records given the victims' objection. She argues that, as victims, the children have a general right to refuse discovery requests

under the VBR, and that the records are privileged and confidential under state and federal law. *See* A.R.S. §§ 36-107, 36-160 (confidentiality of DHS records); 7 C.F.R. § 246.26(d)(1)(i), (ii) (confidentiality of WIC information); § 13-4062(4) (physician-patient privilege); A.R.S. § 12-2292(A) (prohibiting disclosure of health records other than "as authorized by state or federal law," or with written consent of patient). Fox-Embrey argues Main failed to sustain her burden under *Kellywood* of establishing with sufficient specificity that there is a reasonable possibility the WIC records contain information she is entitled to as matter of due process. Distinguishing *Roper*, she dismisses as mere conjecture Main's assertions that there may be medical explanations for the fact that D.C. and A.C. were generally thin children and were, in fact, very thin when they moved into her home. Similarly, she asserts Main's contention that there are reasons to question the children's veracity generally and that the WIC records might contain information relating to their credibility, is pure conjecture.

¶37 Main responds that the respondent judge correctly ordered the disclosure of WIC records but erred in limiting the records to the one-year period preceding the children's November 2015 removal from the home. She insists she "has demonstrated a substantial need of a constitutional dimension for" all WIC records pertaining to the children. Main argues there is not just a reasonable possibility but "a reasonable probability" the records will contain information that is "relevant, material, mitigating and quite possibly exculpatory." Relying on *Ritchie*, Main argues the WIC records are in the possession of DHS, a state agency, and that the state therefore is obligated under *Brady* to disclose evidence material to guilt or punishment and favorable to the defense, or at the very least, present that evidence for an in camera review.

¶38 The state's position on this issue is unclear. Its participation in these proceedings, both in the trial court and before this court in the two special actions, has been minimal. The state permitted Fox-Embrey, through her counsel, to direct the victims' involvement in these proceedings and impliedly, though not expressly, aligned itself with Fox-Embrey. Main asserted during oral argument before this court that the state has taken no position as to whether the records of DHS and DCS, both state agencies, are in the state's possession for purposes of *Brady*, insisting the state essentially has waived any argument that it has no such obligation.

¶39 Before oral argument, the state entered an appearance in this special action and subsequently filed a notice that does not resolve this question. Without specifying whether it was referring to DHS and DCS records, the state acknowledged it "understands its duties pursuant to

Brady . . . and its progeny, and intends to do in this case, as it does in all of its cases, to disclose exculpatory or favorable evidence as required and as ordered." But that notice did not inform this court whether the state has access to and has reviewed the privileged and confidential records and has already disclosed only those documents it is required to disclose under *Brady* and Rule 15.1, or whether it intends to do so in the future. Nevertheless, the state essentially conceded in that notice that *Roper* and *Kellywood* apply, notwithstanding any *Brady* obligation the state may have to review the records and disclose any potentially exculpatory or otherwise favorable evidence to the defense, when it stated: "If Main has not made the required showing under applicable Arizona law that there is a reasonable possibility that the records she seeks contain exculpatory information, then she is not entitled to disclosure of confidential records, and even in camera review would be inappropriate."[5]

¶40 Fox-Embrey argues the WIC/DHS and DCS records may not be regarded as state records for purposes of *Brady*, particularly if that means the state would be required to disclose privileged or confidential records directly to Main. She argued in briefing before this court as well as at oral argument that this would create two classes of child victims, those who receive WIC benefits or who are involved with DCS, and other children. According to Fox-Embrey, the latter would retain their right to object to discovery of privileged and confidential records of this nature under the VBR and privilege statutes, whereas the former would be deemed to have lost that right because the state would be required to simply disclose any potentially exculpatory evidence or possible impeachment information.

¶41 We need not resolve this question.[6] Although Main consistently has maintained both DHS and DCS are state agencies and their records are

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[5]The state filed a similar notice in the first special action. *See* Pinal County Attorney's Office's Reply to Main's Response to Petition for Special Action, *Fox-Embrey v. White*, No. 2 CA-SA 2018-0084.

[6]In *Kellywood*, among the records the defendant had requested were DCS records relating to his daughter. 246 Ariz. 45, ¶ 16. He challenged the trial court's denial of his request for those records, notwithstanding the fact that he had withdrawn his motion to compel their disclosure. *Id*. Consequently, we reviewed the claim for fundamental, prejudicial error. *Id*. (citing *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20 (2005)). We expressly did not answer the question whether the state possessed the DCS records because it is a state agency. *Id*. ¶ 17. Rather, we stated, "assuming without deciding that the DCS records were in the possession or control of a state

subject to disclosure under *Brady*, she seems to concede that it is appropriate to require the court to conduct an in camera review of privileged or confidential documents under the *Kellywood* standard. We therefore address the question whether the respondent erred under *Kellywood* in ordering disclosure of any WIC records for an in camera review and in limiting the records to the one-year period.

¶42 In addition to claiming Main has not sustained her burden under *Kellywood*, Fox-Embrey argued in her special-action petition and asserted during oral argument before this court that the state has already disclosed the medical records of D.C. and A.C. from birth and WIC records would therefore be cumulative. Consequently, she argued, Main cannot show a substantial need for these records. *See* Ariz. R. Crim. P. 15.1(g)(1).

¶43 It is undisputed the WIC records will include general health information, including the children's height and weight at the time of each examination and other information related to whether the children were thriving and properly nourished during the period in which they received benefits. According to Main, the children and their mother received WIC benefits primarily, if not entirely, before they moved in with Main and her wife. Main asserts limiting the records to the one-year period will result in production of records from perhaps only one evaluation. She argues WIC records for the entire time the children received benefits will not only contain information regarding any issues of malnourishment and growth patterns, which is the very essence of charges involving D.C. and A.C.; they could also contain information that would be relevant to the charges involving T.C. and the propriety of a sentence of death on first-degree murder.

¶44 To the extent WIC records may duplicate information contained in previously disclosed medical records, the children necessarily would not be prejudiced by an in camera review of those records. Certainly the strength of their privacy and other rights under the VBR would be diminished. Production of duplicated records could hardly be said to

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agency, they would have been subject to disclosure only insofar as Rule 15.1(b) required it—whether because they contained exculpatory information or otherwise." *Id*. We concluded there was nothing in the appellate record demonstrating the DCS records related to the acts that gave rise to the charges against him or that they contained *Brady* material, that is, information that was materially exculpatory. *Id*. We therefore found no fundamental, prejudicial error. *Id*.

intimidate or harass the children, or otherwise constitute unfair treatment. *See* Ariz. Const. art. II, § 2.1(A)(1). Additionally, assuming they did not object to the state's disclosure of other medical records containing similar information, they arguably have waived the applicable statutory privileges. *See* § 12-2292(A) (prohibiting disclosure of health records); § 13-4062(4) (physician-patient privilege); §§ 36-107, 36-160 (confidentiality of DHS records); 7 C.F.R. § 246.26(d)(1)(i), (ii) (confidentiality of WIC information).

¶45 Moreover, Fox-Embrey conceded at oral argument that although the previously disclosed medical records contain general information regarding the children's health and weight, the WIC records would have information from examinations conducted on different dates than those reflected in the disclosed records. Main contends that in addition to the fact that WIC records can be expected to pertain to evaluations on different dates, the previously disclosed medical records did not "provide a clear story as to weight and growth because" the children's mother "did not seek regular medical care for the children." But she apparently did receive WIC benefits and was therefore required to present the children for height and weight evaluations and blood tests. Main stated during oral argument that even if the information is duplicated, by obtaining the WIC records she will have the opportunity to test the accuracy of the information contained in the medical records. She added, if there was evidence of malnourishment, as a state agency WIC would be required to report that to proper authorities. The absence of that information from WIC records could therefore be favorable to the defense.

¶46 We disagree with Fox-Embrey that the respondent judge erred in finding Main sustained her burden under *Kellywood* justifying the disclosure of the WIC records for the one-year period. But we find persuasive Main's arguments that the respondent abused her discretion by limiting the WIC records to the period between November 19, 2014, and November 19, 2015. The charges as to D.C. and A.C. are based on neglect in the form of malnourishment. WIC records will contain evidence directly related to that issue, including evidence of the children's weight and growth patterns before they arrived at her home in December 2014. Main also asserted during oral argument that the records could contain information that would bear upon the first-degree murder charge. Main argued there is likely to be a spill-over or "rub-off" effect of having all child abuse charges and the murder charge tried together. She asserted that insofar as the WIC and other records contain no evidence that Main mistreated the children over time, it is potential mitigation evidence for purposes of a death sentence. We find these arguments persuasive.

¶47 This court has held that even an in camera review by a trial judge is a significant intrusion into a victim's confidential records. *See Kellywood*, 246 Ariz. 45, ¶ 14. But we agree with Main that given the nature of the WIC records, in balancing her due process rights against the privacy interests of two young children, whether under a statutory privilege or the VBR, and considering the minimal risk of embarrassment to them, Main's interests and due process rights must override those of the victims, at least for the purpose of obtaining an in camera review of the records. Main sustained her burden under *Kellywood* and is entitled to an in camera review of all WIC records for evidence that may be potentially exculpatory and favorable to all charges and relevant and material to the propriety of a death sentence in the event she is found guilty of first-degree murder.

DCS Records – Medical and Therapeutic Records

¶48 In her cross-petition for special-action relief, Main challenges the respondent judge's denial of her request for an in camera review of medical, counseling or other therapeutic records contained in the DCS file. She claims the records likely contain statements D.C. and A.C. made about the allegations of physical abuse of D.C., abuse of D.C. and A.C. by causing them to be malnourished, and the circumstances surrounding T.C.'s death. Main argues that two forensic statements obtained from each child are inconsistent and suggest an adult, whether from DCS or a therapist, coached or otherwise influenced the children. The statements appear to have been obtained at the direction of law enforcement officers, likely in conjunction with the Office of Child Welfare Investigations (OCWI), the investigative arm of DCS, *see* A.R.S. § 8-471.[7] One statement was obtained

[7]Problematically, Main did not provide this court with the forensic interviews or any other documents that support her assertion that the children's statements changed between the two interviews and her claim that the children may have been coached or otherwise influenced by adults. When this court asked Main's counsel about these interviews during oral argument, he stated he was not certain whether he had provided this court with the statements, but noted "[n]o one has disputed" what the children had said to the investigators. Fox-Embrey's counsel stated that to her knowledge, the statements had not been provided to this court, adding that she has never seen them either. But, she did not dispute Main's description of the statements and that there are discrepancies between each child's first and second interviews. We therefore assume as accurate Main's counsel's summary of the children's statements and the distinctions between what they said during the initial and second interviews. Whether the children were coached or otherwise influenced are matters Main would be entitled

on November 15, 2015, and the other on June 9, 2016. Main also claims that during interviews with law enforcement officers, the children's father, the mother, the paternal grandmother and Main's wife had expressed concerns that D.C. may be autistic or could have undiagnosed behavioral disabilities, which Main argues could have affected his ability to communicate and his truthfulness. Main claims that although the children's mother had not had D.C. medically tested and had not discussed her concerns with a physician, it is "more likely than not" that D.C. was evaluated, tested and diagnosed while DCS was involved. Relying on *Ritchie*, Main argues the respondent judge erred in refusing to review these records in camera, insisting in her reply to Fox-Embrey's response to her cross-petition for special-action relief and during oral argument in this court that the respondent erred in finding she had failed to sustain her burden under *Kellywood*.

¶49 Like the WIC records in DHS's possession, Main contends DCS, a state agency, possesses the records she is requesting and the prosecutor is therefore obligated to disclose any potentially exculpatory or favorable information in those records under *Brady*. Again, we need not resolve this question because Main does not dispute that, regardless of whether the records are in the possession of the state, given the victims' rights under the VBR and the protections of the statutory privileges, an in camera review consistent with *Ritchie* and *Roper* and its progeny, including *Kellywood*, is appropriate.

¶50 In a similar vein, Fox-Embrey argues that to the extent A.R.S. § 8-807(B) and (E) may be construed as placing all DCS records into the state's possession for *Brady* purposes, protected documents retain their confidential or privileged nature nevertheless, relying on § 8-807(P). She reiterates that construing the statute otherwise creates two classes of victims, affording those involved with DCS less protection than other child victims.

¶51 Section 8-807 pertains generally to DCS information and the restricted dissemination of that information. Section 8-807(A) provides, "DCS information shall be maintained by the department as required by federal law as a condition of the allocation of federal monies to this state." Section 8-807(X) states that "'DCS information' includes all information the department gathers during the course of an investigation conducted under this chapter from the time a file is opened and until it is closed." The only

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to explore since they relate to the accuracy of the children's statements and their credibility.

material it does not include is information in the child welfare agency licensing records. § 8-807(X).

¶52 The statute requires DCS to provide "DCS information" it acquires to, inter alia, "a law enforcement agency, a prosecutor, an attorney or a guardian ad litem representing a child victim of crime" in order to enforce or prosecute any violation involving child abuse or neglect or to assert the rights of the child as a victim of a crime, and "[t]o provide information to a defendant after a criminal charge has been filed as required by an order of the criminal court." § 8-807(B)(2), (3); *see also* A.R.S. § 8-804.01 (requiring DCS to maintain records of reports of child abuse and neglect, and permitting use of such reports as prescribed in § 8-807 and to assist criminal investigation or prosecution of child abuse or neglect). Section 8-807(E) gives "[a] person or agent of a person who is the subject of DCS information . . . access to DCS information concerning that person." Notwithstanding these disclosure provisions, § 8-807(P) maintains the protected nature of records in the DCS file, providing that "[i]f the department receives information that is confidential by law, the department shall maintain the confidentiality of the information as prescribed in the applicable law." Presumably then, records that would be privileged under Arizona statutes, including § 13-4062(4) and § 32-2085(A), remain so when they become part of the DCS file.

¶53 We interpret statutes to give effect to the intent of the legislature, which is best reflected in a statute's plain language. *See Parrot DaimlerChrysler Corp.*, 212 Ariz. 255, ¶ 7 (2006). Based on the plain language in § 8-807(X), DCS information presumably includes all medical and therapeutic records DCS gathers during the course of an investigation of abuse or neglect. Main does not appear to object, however, to an in camera review as provided in *Ritchie* and *Kellywood* of medical or therapeutic records in the DCS file that previously have not been disclosed, [8]

[8]Based on the briefings below and in this court as well as the oral arguments before us, it appears that, pursuant to *Brady*, the state disclosed to Main all material in the DCS file that DCS had disclosed to the PCSO. As Main explained, the state disclosed to her all hospital and physician records pertaining to D.C., A.C. and T.C., from the children's births to November 19, 2015. Main claims before she was indicted, these records were "gathered by state agents," including DCS, which is responsible for overseeing the health and welfare of children and families and protecting children from neglect and abuse, *see* A.R.S. § 8-451, OCWI, an augmentation of Arizona's child welfare system that investigates criminal conduct allegations of child abuse, *see* A.R.S. § 8-471, and PCSO. The state also

notwithstanding any *Brady* obligation the state may have generally or as a result of § 8-807(B)(2). She simply insists she has sustained her burden under those cases and is entitled to such a review. Consequently, we need not determine whether § 8-807(B)(2), which makes DCS information available and accessible to the state, would require the state to disclose to Main all *Brady* material in the DCS file, including medical and therapeutic records gathered by DCS during an investigation into abuse or neglect, even if not in the physical possession of PCSO or the prosecutor, and notwithstanding § 8-807(P).

¶54 Fox-Embrey, however, is opposed to any disclosure of these privileged records, including an in camera review, insisting they remain protected under § 8-807(P). But the *Roper/Kellywood* procedure, as applied to any DCS records that have not been disclosed thus far, balances and safeguards the rights of child victims against the due process rights of criminal defendants. *See Connor*, 215 Ariz. 553, ¶ 9 (recognizing *Roper* authorized trial court to weigh competing rights and interests of victims and defendants and consider defendant's reasonable need for information, after in camera review); *see also Kellywood*, 246 Ariz. 45, ¶¶ 13-14 (acknowledging in camera review is intrusion on victim's rights, but justifiable when sufficiently specific information presented that satisfies "reasonable possibility" test). Given the competing rights and interests of these victims and Main, the minimal intrusion of an in camera review by the respondent judge, who must balance those interests, is justified. *Cf.* § 8-807(K) (person not specifically authorized under statute to obtain DCS information may seek court order compelling release; requiring court to review records in camera "and . . . balance the rights of the parties who are entitled to confidentiality pursuant to this section against the rights of the parties who are seeking the release of the DCS information"; permitting release when rights of party seeking records outweighs rights of parties entitled to confidentiality).

¶55 We therefore limit our inquiry to whether the respondent erred in finding Main did not sustain her burden under *Kellywood*. In doing so, we are mindful that the determination of what constitutes a reasonable

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disclosed the forensic statements to Main, investigative material that related directly to the acts that resulted in the children's removal from the home as well as criminal charges. And, the state reiterated in this court it is aware of its obligations under *Brady*.

possibility that Main's due process rights require disclosure includes consideration of capital jurisprudence. *See Santiago*, 49 A.3d at 647-48, 651.

¶56 Main asserts the following established her need for at least an in camera review of the medical and therapeutic records in the DCS file. She claims the children were thin and ill when they arrived at her home. Conceding she provided much of the care for the children during the five months that preceded T.C.'s death, she has denied harming T.C. or abusing or neglecting any of the children. Main argues the medical and therapeutic records "are critical to the guilt and if necessary, penalty phases of trial." Specifically, she asserts, differences in the information the children provided during forensic interviews suggest they were "coached or exposed to adult conversation" about the offenses. Main's counsel argued during the February 2019 *Kellywood* hearing she was entitled to counseling records to defend against the charges because the changes in the children's statements could have been the result of therapy. He argued that, as "the Supreme Court cases say," he needed those records so that he could "adequately represent [Main] and . . . present any circumstance regarding the offense or mitigating factors that . . . go to the penalty phase and the sentencer is potentially the jury, not the judge."

¶57 Main has specified the discrepancies between the children's first and second interviews. In the initial interviews, the children did not make any statements about Main having hurt T.C. Main claims that A.C. was asked several times what happened to his sister when she got in trouble and he consistently answered that "she gets her butt smacked." But, Main asserts, during the second interviews, D.C. and A.C. made "matter-of-fact statements about [Main] hitting their sister and causing her death." According to Main, A.C. consistently denied during the first interview that he and D.C. were "smacked." Presumably quoting or at least paraphrasing what D.C. stated, Main also claims he denied seeing T.C. get "her butt smacked," but said he heard a "bad knocking noise" and when he was asked about it again, he said he could not remember. Also according to Main, when A.C. was asked about D.C.'s injured forehead, he said Main "knocked him on the shower curtain" but he then said he did not see it happen. Main claims that at the beginning of the June 2016 interview, A.C. said, "Mama Shawn hit my big brother on his forehead . . . . but she didn't hit me." Also according to Main, A.C. initially denied having a sister but at one point apparently stated that Main had hit T.C. "with a hammer because she wasn't doing her chores right."

¶58 With regard to the issue of malnourishment, Main contends that during the second interviews both children were asked questions about

when they were fed. Their answers were "favorable and do not support malnourishment. It would be foolish to believe that the children's counseling records do not have like evidence," given the reasons the children were removed from the home, noting A.C. had stated they were fed three times a day and given fruits and yogurt.

¶59 In terms of the specificity of Main's reasons for requesting the DCS records, this case is more like *Roper* than *Connor*, *Sarullo* or *Kellywood*. In *Roper*, the defendant sufficiently established her husband had a lengthy history of mental illness, including a multiple-personality disorder. He had received years of psychiatric care, and the defendant claimed she had acted in self-defense when he demonstrated one of his violent personalities during a psychotic episode, becoming violent towards her. *See* 172 Ariz. at 234, 237.

¶60 In *Connor,* the evidence against the defendant showed the "intellectual and emotionally challenged" victim had been "stabbed or cut at least eighty-four times," had sustained "several incisions to his throat, stab wounds to his back, cuts on his face and arms, the near severance of one finger, and numerous wounds to the chest, at least one of which resulted in the collapse of a lung." 215 Ariz. 553, ¶ 2. The physical evidence supporting self-defense was weak, at best, and the defendant's request for records was broad, based on an unsupported hope that they would contain some information that would be helpful to the defense. *See id*. ¶ 11. The defendant did not sustain his burden on appeal of showing the trial court had erred because he had not adequately shown "that the information sought might contain materials necessary to fully present his justification defense or to the cross-examination of witnesses." *Id*.

¶61 Similarly, in *Sarullo*, this court agreed with the trial court that the defendant had not sustained his burden of showing a reasonable possibility that the victim's medical and counseling records would contain information supporting his defense that the victim knew the incident that the charges were based on was centered around his threatened suicide, and that she "developed a psychological need to see the event as an assault." 219 Ariz. 431, ¶ 19. As in *Connor*, the defendant was seeking records based largely on the hope they would contain evidence supporting the defense. We concluded, "there is nothing in the record to support his assertion that the medical records would show [the victim] had not initially viewed the incident as an assault," or establish a reasonable doubt on the question whether he had pointed a gun at the victim. *Id*. ¶ 21. The victim told a police officer who arrived at the scene that the defendant pointed the gun at her, and she persistently maintained that was what had occurred. *Id*.

Because the defendant had not provided the trial court with a reason "to believe [the victim's] medical records would contain exculpatory evidence," we could not say the court had erred by refusing to order disclosure of those records for an in camera review. *Id.*

¶62 Similarly, a majority of this court found the defendant in *Kellywood* had made an insufficient showing to justify an in camera review of the victim's medical, DCS, and counseling records. 246 Ariz. 45, ¶ 10. We concluded the request for the records had been, as in *Connor* and *Sarullo*, based on "speculation that there might be something in records somewhere" that would have been helpful to the defense. *Id*. As the court pointed out, the defendant had not specified any specific condition for which the victim had been receiving treatment or counseling, and had provided no support for the assumption that physicians and counselors would ask questions about whether anyone had engaged in improper sexual conduct with her. *See id*. And unlike here, the DCS records did not relate to the conduct that was the basis of both DCS involvement and the charges against the defendant. *Id.* ¶ 17. Here, DCS's involvement with D.C. and A.C. was the direct result of conduct that is also the bases for the charges. DCS's removal of the children from the home, its investigation of the circumstances surrounding that removal, and its rendering of services to the children, were all inextricably intertwined with the criminal charges brought against Main.

¶63 Main has specifically identified the kinds of records she is seeking and has provided a concrete basis for obtaining an in camera review of those records. Taking this fact together with the fact that the state is seeking a sentence of death, providing a broader basis for determining whether the respondent judge erred in finding Main did not satisfy the *Roper/Kellywood* test, we conclude that Main has sustained that burden. She is entitled to an in camera review of the medical and therapeutic records contained within the DCS file that have not yet been disclosed so that the respondent may determine whether they contain information to which Main is entitled as a matter of due process. *See id.* ¶ 10 (defendant must demonstrate reasonable possibility records contain exculpatory information).

Disposition

¶64 For the reasons stated, we deny Fox-Embrey's petition for special-action relief but grant Main the relief she has requested. The respondent judge's order is vacated and she is directed to review in camera

all WIC records and the medical and therapeutic records contained in the DCS file consistent with this opinion.